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No. 82

In the Supreme Court of the United States

OCTOBER TERM, 1943

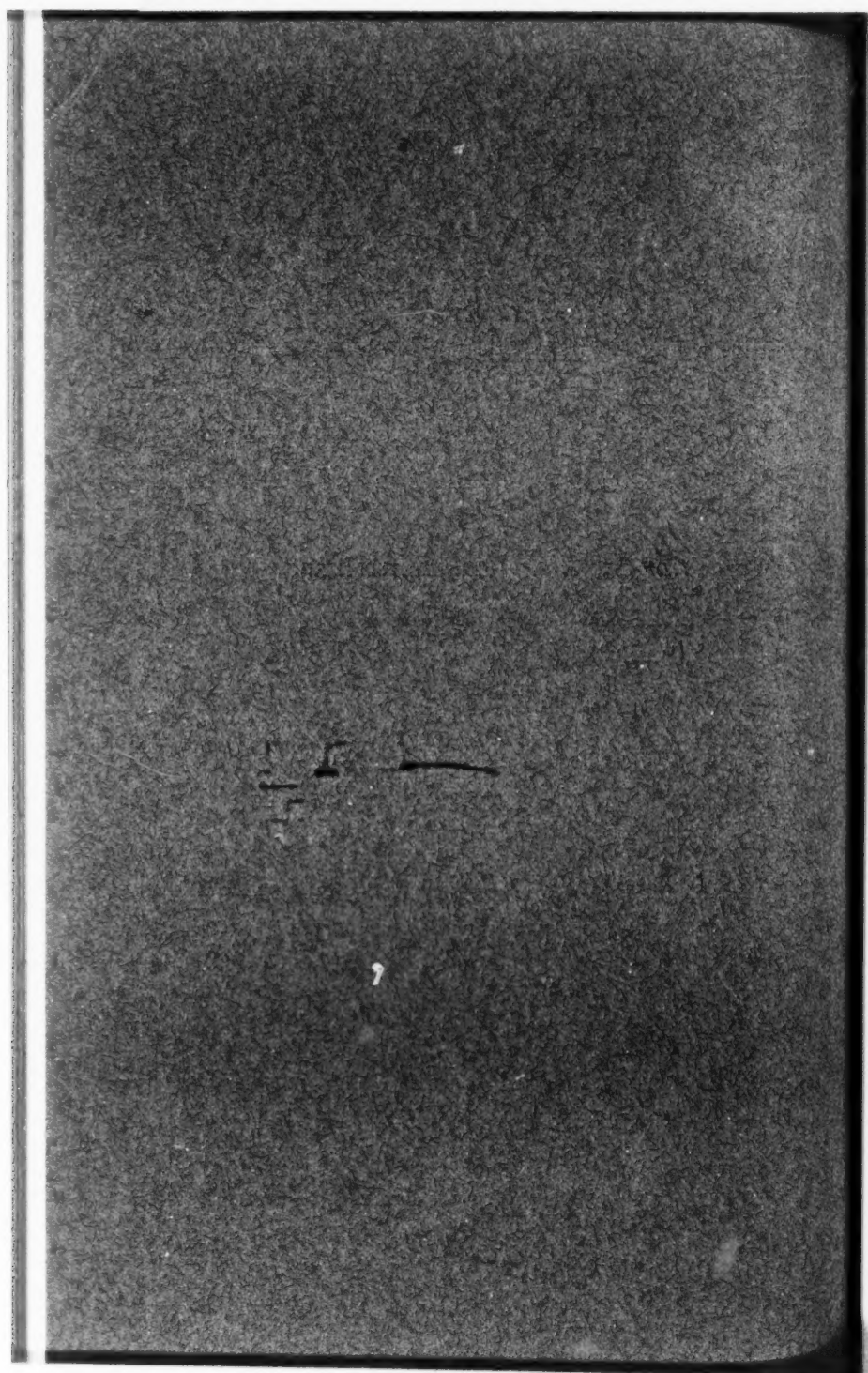
HOWARD B. PARKER, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRICK FOR THE UNITED STATES IN DEFENSE



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HOWARD B. PARKER, PETITIONER

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 259-269¹) is reported in 135 F. 2d 54. The memorandum opinion of the District Court appears at R. 250. The opinion of the Circuit Court of Appeals on an earlier appeal in this case is

¹The record in this case incorporates by reference the printed record in an earlier appeal to the Circuit Court of Appeals, so that it consists of two separate parts. The record on the earlier appeal bore the number 3695 in the Circuit Court. Consequently petitioner has designated his references to that part of the record as "R. 3695." We shall do likewise, and shall designate references to the other part of the record as "R."

reported in 126 F. 2d 370. The memorandum opinion of the District Court on the earlier hearing appears at R. 3695, 49-52.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 13, 1943 (R. 269). The petition for a writ of certiorari was filed on June 4, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner has wilfully prevented a corporation dominated by him from obeying, and from being able to obey, judicial decrees directing payment of sums due the Administrator of a milk marketing order. The device employed was for that corporation to sell its milk to another corporation, also controlled by petitioner, at prices which covered all other costs but deliberately disregarded the amount due the Administrator, and to pay all other items of expense so as to leave the corporation without funds to pay the Administrator. The question is whether the court below could fix the proper measure of a compensatory fine for contempt of court at the difference between the total cost to the selling corporation (including the amounts due the Administrator) and the lesser amounts received by it, a sum

less than the amount due the Administrator, or whether the fine could be no greater than the difference between the amounts received and the fair market value of the milk.

STATUTE INVOLVED

This case does not involve the construction of any statutory provision. The Milk Marketing Order concerned was issued under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U. S. C. 608c, the validity of which was sustained in *H. P. Hood & Sons v. United States*, 307 U. S. 588.

STATEMENT

Petitioner is the treasurer, general manager, and director of the Stuart Milk Company (R. 22), a corporation engaged in the business of selling milk to consumers in the Greater Boston Marketing Area (R. 17). He owns two-fifths of its capital stock and dominates its operations; his father owns the remainder of the stock (R. 22). He also held the same official positions and owned all of the capital stock in Green Valley Creamery, Inc. (R. 21-22), a Massachusetts corporation which was engaged in business as a handler of milk in that Area during the period from October 1934, to March 1940 (R. 16-17).

On October 1, 1937, the United States and the Secretary of Agriculture filed a bill in equity in the District Court seeking a mandatory injune-

tion requiring Green Valley to comply with the provisions of Order No. 4, as amended, issued under the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. 608c *et seq.*), regulating the handling of milk in the Boston Area (R. 3695, 2-11).² A temporary injunction was granted on November 30, 1937, directing Green Valley to pay to the Market Administrator all sums due then or thereafter under the Order, and ordering Green Valley and its officers to comply with all provisions of the Order, during the pendency of the suit (R. 2-3).

On March 15, 1939, the District Court issued a final decree ordering Green Valley to pay the amounts due under the Order and directing Green Valley and its officers to comply with all of the provisions of the Order (R. 3695, 15-16). This decree was affirmed by the Circuit Court of Appeals on December 15, 1939. *Green Valley Creamery v. United States*, 108 F. 2d 342. None of the amounts due the Administrator were ever paid. A petition for attachment for contempt was filed by the United States on December 19, 1939, against Green Valley, petitioner, and Otis H. Parker (petitioner's brother) for disobedience of the final decree (R. 3695, 16-21). The petition was referred to a master. His findings,

² The validity of both the Act and the Order was sustained by this Court in *H. P. Hood & Sons v. United States*, 307 U. S. 588.

which are not challenged by petitioner, may be briefly summarized as follows:

Green Valley performed only the function of buying milk from producers and selling it to Stuart (R. 20).³ All of the milk purchased by Green Valley was resold to Stuart at prices dictated by petitioner, who dominated the operations of both corporations (R. 20-21). These prices were fixed at levels substantially sufficient to cover all the costs of Green Valley apart from the sums owed by Green Valley to the Market Administrator (R. 22). At petitioner's direction, the bills from the Market Administrator were not carried as accounts payable by Green Valley, and its operating accounts were balanced without including therein such bills (R. 24). As a result Green Valley continually operated at a loss; Stuart purchased the entire product of Green Valley during the period from August 1, 1937 (the effective date of the Order), to December 31, 1939, at \$47,072.65 less than the total cost of the products to Green Valley, if the sums due the Market Administrator are included in the cost (R. 28, 24).⁴

³ Before the issuance of the first milk license for the Boston area, the Stuart Company purchased its milk directly from producers; this method of doing business would have obligated it to make payments to the equalization fund under the Order. In 1934, after the promulgation of the first predecessor to the Order, Green Valley was organized, and it undertook to purchase the milk from the producers and to resell it to Stuart (R. 139-140, 261-262).

⁴ The computation by which this result was reached appears at R. 3695, pp. 41-42. The Master included in the cost the

By this conduct petitioner disabled Green Valley from paying the amounts due the Administrator and from complying with either the temporary or the final decree (R. 27, 23). On December 31, 1939, Green Valley was insolvent (R. 24).⁵ The Master found that petitioner deliberately pursued this course of action for the purpose of placing Green Valley's funds and assets beyond the reach of the Market Administrator and thereby hindering and delaying him (R. 28). The Master also found that the amount due the Administrator by Green Valley for the period from August 1, 1937, to March 30, 1940, was \$41,722.37 (18-31).⁶

On January 27, 1941, the District Court confirmed the Master's report and entered an order

amount paid producers, the operating expenses, and the amounts due the Market Administrator, getting a total of \$199,324.79. From this he deducted the amount received from Stuart for the milk, \$152,252.14, leaving a loss of \$47,072.65.

⁵ In June 1939, shortly after this Court's decision in the *Hood* case, *supra* (R. 25) * * * "the board of directors of Stuart Milk Company voted to pay to said Howard B. Parker a bonus of \$10,000, payable at the rate of \$100 per month, and to secure said bonus authorized and directed the execution of a mortgage to said Howard B. Parker upon the real estate and personal property of the corporation, exclusive of accounts receivable. Whether said bonus was paid in whole or in part did not appear in evidence."

⁶ This figure is obtained by totalling the amounts due for producer settlement account (\$39,595.92), marketing services (\$806.13), and administration expense (\$1,320.32) (R. 19-21).

adjudging petitioner, Green Valley, and Otis H. Parker in contempt, and directing that petitioner be committed to jail until compliance by Green Valley with the Marketing Agreement Act of 1937 and the mandatory injunction (R. 3695, 48-49).

Petitioner appealed to the Circuit Court of Appeals. *Parker v. United States*, 126 F. 2d 370. That court held that since both the interlocutory and permanent injunctions directed Green Valley to make the payments to the Administrator and that corporation was now bankrupt and unable to pay, petitioner could not be committed to jail until compliance by Green Valley with the Marketing Agreement Act of 1937 and the mandatory injunction. However, it held that since petitioner had deliberately rendered Green Valley incapable of complying with both the temporary and the final decrees, a compensatory fine should be imposed upon him measured by the amount by which petitioner had made it impossible for Green Valley to pay the Administrator as directed by both decrees.

It then established the guides to be followed by the District Court in assessing the compensatory fine. It referred to the finding of the Master that the total amount due the Market Administrator for the period from August 1, 1937, to March 30, 1940, was \$41,722.37, and to the finding that Green Valley sold milk to Stuart from Au-

gust 1, 1937, to December 31, 1939, at \$47,072.65 less than its actual cost, including in the cost the amount owed the Market Administrator. It pointed out, however, that the latter sum included losses incurred by Green Valley prior to November 30, 1937, the date of the interlocutory decree, for which petitioner could not be held in contempt. It concluded that (126 F. 2d, at 380):

In determining the extent of the compensatory fine to be imposed upon Parker, the district court should consider only losses resulting from prices established by Parker after the rendition of the interlocutory decree. On the other hand, the court will be entitled to take into account the further losses resulting from Parker's pricing policy for the period from January 1, 1940, to March 30, 1940, as to which no figures appear in the record before us. Since the fine is compensatory it should as a maximum be no larger than the aggregate amount due the market administrator from Green Valley, with interest.

Accordingly, the case was remanded to the District Court with directions to amend its order so as to impose upon petitioner a fine "the amount of which will be determined by the court, with due regard to the guides laid down in this opinion" (126 F. 2d, at 381).

On March 23, 1942, the United States filed in the District Court a motion for an order in accordance with the mandate (R. 247-249), and on June

16, 1942, the District Court entered its order imposing a fine of \$42,236.74 upon petitioner (R. 251). It is apparent from the motion and order that the District Court followed the mandate of the Circuit Court of Appeals in fixing the fine. It started with the figure of \$47,072.65, the amount which the Master had found represented the loss to Green Valley for the period from August 1, 1937, to December 31, 1939, resulting from sales below cost. As directed by the appellate court, it deducted the loss occurring during the period from August 1, 1937, to November 30, 1937, amounting to \$4,100.96.⁷ It also deducted a credit of \$734.95 which had been allowed by the Market Administrator after the Master had reported. The Government did not present evidence concerning the loss during the period of January 1, 1940, to March 30, 1940, which the Circuit Court of Appeals said could be included, and it was considered waived. The total loss therefore was \$42,236.74. The total amount due the Administrator, with interest added to date, was \$48,903.41. Since the amount of the loss was less than the sum due the Administrator, the fine was fixed at the former figure. (R. 247-251, 267; R. 3695, 41.)

Petitioner again appealed to the Circuit Court of Appeals. That court held that (R. 261) "The

⁷ This figure is obtained by adding the first four sums in the right hand column on R. 3695, 41, which represent excess of cost over sales for each of the four months during this period.

only point raised is that the district court did not follow the directions in our mandate in fixing the amount of the fine." And it concluded that (R. 267) "The district court, in determining the amount of the compensatory fine, followed the directions in our mandate."

Petitioner argued in the Circuit Court of Appeals that the proper measure of the fine should have been the difference between the fair market value of the milk and the price at which Green Valley sold it to Stuart,^{*} rather than the difference between the cost of the milk to Green Valley, including the amount due the Market Administrator, and the price received for it (R. 267-268). This contention was rejected on the ground that, although such a test might be proper in the case of a corporation operated in a *bona fide* manner, it was not valid where the business of the corporation had been conducted in such a way as deliberately to hinder the Market Administrator and to render the corporation incapable of complying with the court decrees (R. 269). The court

^{*} The Master had found that during the period from August 1, 1937, to December 31, 1939, Stuart had purchased Class I milk from Green Valley at \$26,973.30 less than it could have bought from other handlers, and he took the price at which Stuart might have purchased from others as determinative of the fair market value (R. 28, 31). If this figure were used, it would, of course, make the fine considerably lower. The figure given does not include the relatively small quantity of Class II milk sold by Green Valley (R. 32).

added that (R. 268): "In our opinion on the previous appeal we did not mention this finding of the master as to market value because we regarded it as not material to our disposition of the case."

In his petition for a writ of certiorari, petitioner raises only the question whether the fine was correctly measured.

ARGUMENT

We think it is clear that the Circuit Court of Appeals properly measured the fine. Petitioner deliberately pursued a course of conduct intended to prevent Green Valley from complying with the court decrees (R. 28, 27, 23). He persistently sold to Stuart at prices which included the other costs but completely disregarded the sums due the Administrator. By having Green Valley pay all other bills, he made it impossible for the Administrator to recover from the corporation (R. 22, 24, 28). Under these circumstances, it would have been proper to require him to pay as a compensatory fine the total amount owed the Administrator, \$48,903.41. The court, however, measured the fine by the difference between the price received from Stuart and the cost to Green Valley, including in the cost the amount due the Administrator. This, it held, was the amount by which petitioner disabled the corporation from complying with the decrees. The fine of \$42,236.74

thus imposed was, we think, more favorable than petitioner deserved.

Petitioner contends that the proper measure of the fine is the difference between the fair market value of the milk and the amount actually received, on the ground that Green Valley could not have received more than the market value. In this case, however, there is no reason to speculate concerning the price which the corporation could have received or the extent to which it could have complied with the decrees had it been permitted to try. Petitioner operated the corporation for the deliberate purpose of preventing collection of the sums due. He eliminated Stuart's responsibility to the Administrator by using Green Valley to buy milk from producers. Green Valley was kept bankrupt so that it could not pay the Administrator the sums required both by statute and by specific decrees of the District Court. If Green Valley was unable to operate legitimately and to comply with the decrees, it should have ceased doing business; indeed, the only reason for its continuance in business was to avoid compliance.

Moreover, even if it be assumed that payment by Stuart to Green Valley of the fair market value would not have covered all of Green Valley's costs, it does not follow that all, or indeed any, of Green Valley's book loss would have been passed on to the Administrator. An operator

who was not trying to defraud the Administrator might have arranged his affairs so that the Administrator was not the last creditor to be paid. Petitioner's argument that any deficit should be ascribed to the payments due to the Administrator assumes no change in petitioner's past practice in this respect. And it is not inconceivable that if the business had been operated in good faith, without the corporate manipulations actually availed of, the loss might have been eliminated.

The court below did not, as petitioner contends, apply punitive tests in considering the purpose and intent of petitioner. The basis of the compensatory fine was that petitioner had deliberately disabled Green Valley from complying with the decrees. The court thought, and properly so, that if petitioner had conducted the business of Green Valley in a *bona fide* manner, different considerations might apply. But since petitioner intentionally prevented compliance, the court was of the opinion that his responsibility should be measured by the amount by which he disabled the corporation from obeying the decrees. In determining his responsibility on this basis, it was necessary to refer to his purpose and intent. In so doing the court was not assessing a punitive fine but was merely determining the proper amount of the compensatory fine.

The decision in this case is not in conflict with *National Labor Relations Board v. Whittier Mills*

Co., 123 F. 2d 725 (C. C. A. 5), as petitioner contends. There it was held simply that in a civil contempt case it is not necessary to show intent to violate the decree. In the instant case there is no dispute on the question whether petitioner intended to violate the decree. The only question is the measure of the fine. There is nothing in the *Whittier* case to indicate that intention should not be considered in determining the measure of a compensatory fine where a corporate official is held responsible for disabling the corporation from complying with a decree.

The decision of the court below is not in conflict with other decisions of this Court or of other Circuit Courts of Appeals, and the issue as to the proper measure of the fine presents no question of public importance and no doubtful question of law. The case does not involve any general question as to the measure of a compensatory fine in ordinary civil contempt cases, but merely whether, on its particular facts, the fine assessed was correct.

CONCLUSION

Petitioner has raised no question which warrants review by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1943.